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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

IN RE JANUARY, 1986 GRAND JURY NO. 217,

JACK AND WANDA BERNSTEIN,

Petitioners,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST DISTRICT — THIRD DIVISION

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QUESTIONS PRESENTED FOR REVIEW

I.

May an individual be compelled to be a witness against himself at a grand jury investigation, under a purported grant of immunity which neither prohibits the State from prosecuting him for the crimes under investigation, nor prohibits the State from using evidence derived from the grant of immunity in the prosecution?

II.

Does the Fifth Amendment's privilege against compelled self-incrimination protect the testimony inherent in the act of producing a document which is required by state law to be kept?

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In The

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October Term, 1987

IN RE JANUARY, 1986 GRAND JURY NO. 217,

JACK AND WANDA BERNSTEIN,

Petitioners,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ILLINOIS APPELLATE COURT, FIRST DISTRICT — THIRD DIVISION

OPINIONS BELOW

In re January, 1986 Grand Jury, No. 217, 155 Ill. App. 3d 445, 508 N.E.2d 277 (1st Dist. 1987), *leave to appeal denied*, 116 Ill. 2d 555, ____ N.E.2d ____ (1987). The opinion of the Illinois Appellate Court, First District, Third Division, also appears at App. 1.[1] The oral opinion and order of the Circuit Court of Cook County, Illinois, County Department—Criminal Division, are unreported and appear at App. 15 and App. 29, respectively.

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[1] The Appendix hereto shall be cited as "App." The Record on Appeal as "R."

JURISDICTION

The trial court entered judgment on March 25, 1986. App. 29-30. The Appellate Court of Illinois entered judgment on April 15, 1987. App. 1. Rehearing was denied on May 29, 1987. App. 31. The Illinois Supreme Court denied leave to appeal on October 20, 1987 without opinion. App. 32. This petition for a writ of certiorari was filed within 60 days of the date of entry of said denial. Jurisdiction is conferred upon this Honorable Court by 28 U.S.C. §1257(3) because the petitioners have set up and claimed rights, privileges and immunities under the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

1. United States Constitution, Amendment IV.

   The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. United States Constitution, Amendment V.

   No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or navel forces, or in the Militia when in actual service in time of War or public danger; nor shall any person be subject for the same offense to

be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATUTES INVOLVED

1. Illinois Revised Statutes Chapter 38, Sections 106-1, 106-2 (1985).

> **106-1. Granting of Immunity.** In any investigation before a Grand Jury, or trial in any court, the court on motion of the State may order that any material witness be released from all liability to be prosecuted or punished on account of any testimony or other evidence he may be required to produce.
>
> **106-2. Effect of Immunity.** Such order of immunity shall forever be a bar to prosecution against the witness for any offense shown in whole or in part by such testimony or other evidence except for perjury committed in the giving of such testimony.

2. Illinois Revised Statutes Chapter 120, Section 446 (1985), in pertinent part. (The full text is set forth verbatim at App. 37).

> **Records and books-Inspection-Destruction of returns, records.**
>
> Every person engaged in the business of selling tangible personal property at retail in this State shall keep records and books of all sales of tangible personal property, together with invoices, bills of lading, sales records, copies of bills of sale, inventories prepared as of December 31 of each year or otherwise annually as has been the custom in the specific trade

and other pertinent papers and documents. Every person who is engaged in the business of selling tangible personal property at retail in the State and who, in connection with such business, also engages in other activities (including, but not limited to engaging in a service occupation) shall keep such additional records and books of all such activities as will accurately reflect the character and scope of such activities and the amount of receipts realized therefrom.

3. Illinois Revised Statutes Chapter 120, Section 452 (1985), in pertinent part. (The full text is set forth verbatim at App. 39).

> **Violations—Penalties.** . . . Any person . . . who fails to keep books and records as required herein . . . is guilty of a Class 4 felony . . . [w]hen the amount due is $300 or more, any person engaged in the business of selling tangible personal property at retail in this State who files, or causes to be filed, a fraudulent return . . . is guilty of a Class 3 felony . . . [a] prosecution for any act in violation of this Section may be commenced at any time within 3 years of the commission of that act.

STATEMENT OF THE CASE

In October, 1985, the Illinois Attorney General's office ("State") began a grand jury investigation of Jack and Wanda Bernstein for the alleged crimes of Retailers' Occupational Tax fraud (sales tax fraud) and Illinois Income Tax fraud for the tax years 1982, 1983 and 1984. R. 27.

In January, 1986 the Cook County Grand Jury issued a subpoena *duces tecum*, directed to the Bernsteins which demanded production of, *inter alia*, all of their financial

documents including those pertaining to sales and purchases in their business and any written materials provided to their accountant for the tax years 1982, 1983 and 1984. R. 2, 48.

On February 7, 1986, when the Bernsteins came to the grand jury chambers in response to the subpoena, the State waived their appearance before the grand jury upon the stipulation that they would have testified only as to their name and address and would have responded as follows to all other questions, including whether they had brought any responsive documents with them:

> I respectfully decline to answer your question pursuant to the Fifth Amendment to the United States Constitution and Article I, Section 10 of the Constitution of the State of Illinois. [R. 15, 16, 49].

Thereafter, the parties appeared before the trial court on the State's two identical motions to grant each of the Bernsteins what the State termed "production immunity." R. 3-21.

The motions recited that they were brought under the Illinois Immunity Statute, Ill. Rev. Stat. Ch. 38, §106 *et seq.* (1985), but also requested that the immunity be limited to:

> . . . production immunity for admitting that the records and documents not required to be kept by statute or regulation and demanded in the subpoena duces tecum January, 1986, Grand Jury #217 1) exist; 2) are the ones sought in the subpoena; and 3) are in [the Bernsteins'] custody . . . No immunity is granted as to production of any records of [sic] documents required to be kept by statute or regulation. [R. 3-7].

The Bernsteins objected to the State's motions contending that the immunity sought by the State was insuffi-

cient under the Illinois Immunity Statute which authorizes nothing short of full transactional immunity which must release them from prosecution for the crimes under investigation. The Bernsteins also contended that even if "production immunity" existed in Illinois, the requested immunity was still insufficient because it did not immunize them in regard to the admission of the genuineness of the documents which would be inherent in the compelled production thereof.

Over the objections, the trial court entered two immunity orders, one for each individual. App. 33-36; R. 9-12. As requested by the State, the orders limit the immunity by stating:

> . . . [the Bernsteins are] granted production immunity for admitting that the records and documents not required to be kept by statute or regulation demanded in the subpoena duces tecum January 1986 Grand Jury #217 1) exist; 2) are the ones sought in the subpoena; and 3) are in [the Bernsteins'] custody . . . No immunity is granted to [the Bernsteins] with respect to any crimes which the contents of the documents might reveal were committed by [the Bernsteins]. *No immunity is granted as to production of any records or documents required to be kept by statute or regulation.* [App. 33-36; R. 10, 12. Emphasis added].

Notwithstanding the entry of the purported immunity orders, the Bernsteins continued to assert the Fifth Amendment to the United States Constitution as a bar to the subpoena's demanded production for several reasons, two of which are pertinent to the present petition. First, in regard to the testimony inherent in the act of producing voluntarily kept records, the orders were not in compliance with the Illinois Transactional Immunity Statute since the Bernsteins were not released from prosecution

for the crimes under investigation. Second, the Act of Production Doctrine promulgated under the Fifth Amendment protected testimony inherent in the act of producing even required records but the orders specifically excepted any immunity for such testimony.

The State filed a motion requesting the trial court to hold the Bernsteins in contempt for their failure to produce the documents. R. 23-25. The Bernsteins raised the foregoing objections based upon the Fifth Amendment in their briefs responding to the State's motion and at oral argument which took place on March 25, 1986. App. 15-27; R. 27-135.

The trial court ruled in favor of the State but also stated:

> . . . really this reading of all these cases is that they are really in a state of flux. There isn't any clear cut case . . . there is [sic] a lot of legal issues to be resolved. I don't know if we can resolve them here. I will enter a rule to show cause and failure to comply with [sic] result in a $50.00 a day fine. I will stay it while you appeal it. That's the only way that this thing can be resolved . . . I'm not saying that there is no merit on the part of the defendants in this case. [App. 26-27; R. 133-34].

A written order was then entered by the trial judge in accordance with the foregoing ruling. App. 29; R. 117.

On appeal to the Illinois Appellate Court, the Bernsteins, in their briefs and at oral argument, once again contended that they need not produce voluntary records unless granted transactional immunity releasing them from the crimes under investigation. The appellate court held that the immunity orders complied with Illinois transactional immunity. App. 3-6. But then, in an unprecedented opinion, the appellate court went on to hold that this im-

munity neither released the Bernsteins from prosecution for the crimes under investigation nor prohibited the State from using the evidence derived from the testimony compelled under the grant of immunity (i.e. the documents) in the prosecution. App. 6.

In regard to the Bernstein's contention that the Fifth Amendment protected the testimony inherent in the act of producing even required records, the appellate court held that the "Required Records Doctrine" vitiated the Fifth Amendment's protection for testimony inherent in the act of production. App. 11-13.

As a result of the illusory immunity fashioned by the appellate court and its application of the Required Records Doctrine to the testimonial act of producing required records, the appellate court affirmed the trial court's order which, *inter alia*, holds the Bernsteins in contempt.[2] App. 14.

The Bernsteins petitioned the appellate court for a rehearing contending, *inter alia*, that the compelled act of production under the immunity fashioned by the appellate court, which neither prohibits prosecution nor use of the evidence derived from the grant of immunity, is abhorrent to the Fifth Amendment. The petition for rehearing was denied without opinion. App. 31.

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[2] In regard to both the voluntary and required records, the Bernsteins have never admitted the existence, possession or genuineness of any document, nor has the State ever indicated that it has any independent means of establishing these elements. The appellate court specifically found that compelling production of the voluntarily kept documents would have testimonial impact and a possibly incriminating effect. App. 4-5.

A subsequent petition for leave to appeal to the Illinois Supreme Court, raising the same Fifth Amendment issues, was denied without opinion.[3] App. 32.

REASONS FOR GRANTING THE WRIT

The appellate court's decision, as left standing by the Illinois Supreme Court, holds that an individual may be compelled to be a witness against himself under a purported grant of immunity which neither releases him from prosecution for any crimes nor prohibits the State from using evidence derived from the grant of immunity. This is a federal question decided by a state court in a way in conflict with applicable decisions of this Court. This Court should grant the present petition for a writ of certiorari in order to prevent this blatant circumvention of the Fifth Amendment's privilege against compelled self-incrimination. *See*: Supreme Court Rule 17(c).

The appellate court's decision, as left standing by the Illinois Supreme Court, holds that the Fifth Amendment's prohibition against self-incrimination does not protect testimony inherent in the act of producing required records. This is an important question of federal law which should be, but has not been, settled by this Court. This Court should grant the present petition for a writ of certiorari to settle this issue. *See*: Supreme Court Rule 17(c).

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[3] In their briefs before all three state courts, the Bernsteins also contended that if the immunity orders did not release them from the crimes under investigation on the theory that the compelled evidence did not relate to said crimes, then the subpoena violated the Fourth Amendment's prohibition against unreasonable searches and seizures.

I.

THE APPELLATE COURT ERRED IN FASHIONING A FORM OF IMMUNITY WHICH NEITHER RELEASES THE PETITIONERS FROM PROSECUTION NOR PROHIBITS USE OF THE EVIDENCE IN THE PROSECUTION.

Beginning with *Boyd v. United States*, 116 U.S. 616 (1886), this Court looked to the nature and contents of subpoenaed documents to determine whether the Fifth Amendment's prohibition against compelled self-incrimination protected them. *In re Kave*, 760 F.2d 343, 355-56 (1st Cir. 1985); *United States v. Edgerton*, 734 F.2d 913, 918 (2d Cir. 1984).

Under *Boyd* and its progeny, the privilege was construed to protect the *contents* of personal business records, provided they were in the possession of the individual claiming the privilege. *In re Grand Jury Subpoenas Duces Tecum Dated 6-13-83 and 6-22-83*, 722 F.2d 981, 983-84 (2d Cir. 1983).

An exception to this Fifth Amendment protection was that the contents of even personal business documents were not protected if they were: (1) required by law to be kept; (2) were of a type customarily kept by the individual from whom they were sought; (3) had acquired public aspects; and (4) the purpose of the recordkeeping requirement was essentially regulatory. This exception is known as the "Required Records Doctrine." *See, e.g.*: *Shapiro v. United States*, 335 U.S. 1, 16-27 (1948); *United States v. Edgerton, supra* at 918; *see generally*: *Marchetti v. United States*, 390 U.S. 39 (1968).

In *Fisher v. United States*, 425 U.S. 391, 410-14 (1976) and *United States v. Doe*, 465 U.S. 605-14 (1984), this Court *ended* the content oriented approach to Fifth Amendment

protection in document production by determining that the very act of producing documents has communicative aspects of its own, wholly aside from the nature and contents of the documents and that under certain circumstances the act of production may fall within the aegis of the Fifth Amendment, even if the documents themselves do not. *See also*: *In re Kave, supra* at 355-56; *United States v. Edgerton, supra* at 918, n. 4; *In re Grand Jury Subpoena,* 784 F.2d 857, 858, n. 2 (8th Cir. 1986).

The act of production becomes testimonial in nature and is protected if the act tacitly admits that: (a) the documents exist; (b) that they are in the defendant's possession; (c) that the documents are those described in the subpoena; or (d) that they are authentic or genuine. *United States v. Doe, supra* at 606-14; *see also: Matter of Grand Jury Empaneled March 19, 1980,* 541 F. Supp. 1, 3 (D.N.J. 1981), aff'd, 680 F.2d 327, 335 (3d Cir. 1982), modified other grounds, *sub nom. United States v. Doe,* 465 U.S. 605 (1984). This is known as the "Act of Production Doctrine."

As a result of the Act of Production Doctrine, this Court held in *United States v. Doe* that the government could compel production of the documents therein only if the defendant were given immunity pursuant to the federal use immunity statute, 18 U.S.C. §6002 *et seq. United States v. Doe,* 465 U.S. 605, 614-17 (1984). Under that statute the government is not prohibited from prosecuting the individual for the crimes under investigation but is prohibited from using the testimony inherent in the act of production and any evidence derived therefrom—which would be the documents themselves and their contents. *See, e.g.*: *Kastigar v. United States,* 406 U.S. 441, 448-59 (1972); *Fisher v. United States,* 425 U.S. 391, 433-34 (1976) (Marshall, J. concurring).

In requesting the trial court to grant immunity to the Bernsteins to compel production of their voluntarily kept records, the State herein coined the phrase "production immunity" to signify immunity which would only prohibit the State from *use* of the testimony inherent in the act of production but which would not prohibit it from prosecuting the Bernsteins for the crimes under investigation. This was the form of immunity granted by the trial court to compel the Bernsteins' testimonial act of producing their voluntarily kept personal business documents. App. 33-36.

The speciousness of that form of immunity in Illinois, however, is that the immunity statute therein (Ill. Rev. Stat. Ch. 38, §106 *et seq.* (1985)) does not authorize the grant of use immunity. The Illinois Supreme Court has consistently held that this statute only authorizes full, unconditional transactional immunity which must release the individual from prosecution for any crimes to which the compelled evidence may relate. *People ex rel. Cruz v. Fitzgerald*, 66 Ill. 2d 546, 550, 363 N.E.2d 835, 836-37 (1977); *People v. Walker*, 28 Ill. 2d 585, 590, 192 N.E.2d 819, 822 (1963). *See*: *Kastigar v. United States*, *supra* at 443, (transactional immunity grants immunity from prosecution for offenses to which compelled testimony relates).

In order to circumvent Illinois transactional immunity and the Fifth Amendment's prohibition against compelled self-incrimination, the appellate court below paid lip service thereto by declaring that the Bernsteins had been granted transactional immunity in accordance with the Illinois statute. App. 5-6. This immunity, however, is illusory because the court went on to hold that it neither released the Bernsteins from prosecution for the crimes under investigation nor prohibited the State from using the evidence derived from the immunized testimony in any such prosecution. App. 6.

A. The Appellate Court's Holding That Transactional Immunity Only Releases Crimes Revealed By The Compelled Testimony And That The State May Compel Evidence Unrelated To Its Investigation Is In Direct Conflict With Applicable Decisions Of This Court.

The linchpin of the appellate court's decision is an erroneous recognition of "immunity for the act of production" as being "narrow." App. 6. No authority was cited for that proposition. "Immunity for the Act of Production" is only a convenient descriptive phrase signifying immunity granted to compel the testimonial act of producing documents. It is not a *sua generis* form of immunity. The law has only recognized two proper forms: (1) transactional immunity; and (2) use and derivative use immunity. The former, which is the only form that may be granted under Illinois law, is extremely broad. The latter is the narrowest which meets the parameters of the privilege against self-incrimination. *Kastigar v. United States, supra* at 454; *accord: People ex rel. Scott v. Walsh,* 89 Ill. App. 3d 831, 832, 412 N.E.2d 208, 209 (2d Dist. 1980).

Having erroneously established the narrowness of the so called "production immunity," the appellate court went on to hold that such immunity only releases the Bernsteins from crimes which are *revealed* by the testimony inherent in the act of production; that the testimony inherent in the act of production was not *related* to the crimes under investigation and that the immunity, therefore, comported with transactional immunity even though the Bernsteins were not released from the crimes under investigation. App. 6. The appellate court cited no authority for the proposition that immunity which only releases crimes actually *revealed* by the compelled testimony is consonant with the Fifth Amendment; nor did it articulate why there was no relationship between the compelled testimony and the investigation.

The foregoing rationale employed by the appellate court is nothing short of circuitous and sophistic logic. Not even the State, in its briefs below, contended that the testimony it sought to compel was not related to the investigation. Indeed, the State had tacitly acknowledged that the testimony was "linked" to the crimes under investigation. R. 17. There is an obvious distinction between evidence that relates to a crime and evidence that directly reveals a crime. For example, if an individual given transactional immunity were to be asked where he was on the night of a murder, there is no question that his answer would relate to the crime even though it would not reveal it. He should, therefore, be released from prosecution for that crime. Under the logic employed by the appellate court below, however, nothing short of a confession *revealing* the crime would suffice. This Court, however, has clearly stated that transactional immunity must prohibit prosecution for crimes *related* to (not just *revealed* by) the compelled testimony. *Kastigar v. United States*, 406 U.S. 441, 443 (1972.)

The relationship between the testimony the State seeks to compel herein and the crimes under investigation is manifest. The State seeks documents which may disclose the Bernsteins' sales and income for an investigation of the crimes of state sales tax and income tax fraud. The testimony that the Bernsteins will be compelled to produce under the purported grant of immunity is, *inter alia*, testimony that the documents exist and are authentic. This testimony is not only related to the crimes under investigation but will be a *sine qua non* of the State's case.

In the alternative, assuming *arguendo* that the testimony is not related to the crimes under investigation, then the State has no legitimate purpose whatsoever in compelling the testimony.

In *Shapiro v. United States*, 335 U.S. 1, 30 (1948) this Court held that a subpoena which seeks testimony that is irrelevant to an investigation violates the Fourth Amendment's prohibition against unreasonable searches and seizures. *Cf: F.T.C. v. American Tobacco Co.*, 264 U.S. 298, 303-07 (1924). This holding in *Shapiro* was completely ignored by the appellate court but is of grave import because if the evidence does not relate to the crimes, then the State may not compel its production without violating the Bernsteins' rights under the Fourth Amendment. This holds true even if the immunity were proper since the immunity supplants the Fifth Amendment, not the Fourth. *Cf: Kastigar v. United States*, 406 U.S. 441, 448-59 (1972), (by implication). The Fourth Amendment operates independently of the Fifth to protect a grand jury witness against an improper order to produce evidence. *Fraser v. United States*, 452 F.2d 616, 619 (7th Cir. 1971). Accordingly, even if the appellate court were correct in its holding that the testimony the State seeks to compel is not related to the crimes under investigation, then the appellate court erred in compelling the production of irrelevant evidence.

B. The Appellate Court's Holding That Evidence Derived From A Grant Of Immunity May Be Used In A Prosecution Against The Witness, Is Violative Of The Privilege Against Self-Incrimination And Is In Direct Conflict With Applicable Decisions Of This Court.

The protection afforded an individual by transactional immunity is extremely broad and, in fact, broader than the scope of the privilege against self-incrimination itself. *See: Kastigar v. United States, supra* at 453. The protection afforded by use immunity, on the other hand, is the narrowest that still meets the parameters of the privilege against self-incrimination. *See generally: Kastigar v.*

United States, supra. The immunity must, at a minimum, prohibit the prosecutorial authorities from using the compelled testimony in *any* respect, including as an investigatory lead. *Id.* at 453-54. Immunity is consonant with Fifth Amendment standards only if it proscribes the use, in any criminal case, of the testimony or other information compelled under the order and "any information directly or *indirectly* derived from such testimony or other information . . . " *Id.* at 453, (emphasis added).

At a minimum, therefore, the State herein must not only be prohibited from using the testimony inherent in the act of producing the documents, but must also be prohibited from using the documents themselves, since they and their contents would be the "fruits" of the immunized testimony. *See, e.g.: Id.* at 448-59; *Fisher v. United States,* 425 U.S. 391, 433-34 (1976) (Marshall, J., concurring).

Even the appellate court below, early in its opinion, recognized that the narrower use immunity would prevent the prosecution from using both the compelled testimony and "*any information derived therefrom,*" in prosecution of a witness. App. 5. Yet, later in its opinion the court stated that the contents of the documents produced by the Bernsteins under the immunity orders herein can be used by the State in its prosecution. App. 6.

The net effect of the appellate court's construction of the immunity orders and the order compelling the Bernsteins to produce their voluntarily kept documents, therefore, is that the Bernsteins have neither been released from prosecution for any crimes nor is the State prohibited from using the fruits of the immunized testimony in that prosecution. This result is a complete anathema to the Fifth Amendment and constitutes a most serious departure, in the State of Illinois, from clearly established

constitutional principles. This Court should, therefore, grant the petition for writ of certiorari so that it can correct this alarming departure by a state court from applicable decisions of this Court. By granting the petition, this Court will continue to zealously safeguard the values which underlie the privilege against compelled self-incrimination. *See*: *Kastigar v. United States*, *supra* at 445.

II.

THE APPELLATE COURT ERRED IN APPLYING THE REQUIRED RECORDS DOCTRINE TO THE TESTIMONIAL ACT OF PRODUCING DOCUMENTS.

For purposes of obtaining the immunity orders from the trial court below, the State herein, following the antiquated "content oriented approach," established two categories of documents: (1) those which were voluntarily kept by the Bernsteins; and (2) those which the State contended were required to be kept by law under Ill. Rev. Stat. Ch. 120, §446 (1985). Thus, the orders of the trial court granted immunity only to testimony inherent in the act of producing voluntary records, but not required records. App. 33-36; R. 4, 7, 10, 12.

The appellate court below held that there is no need to immunize the testimony inherent in the act of producing required records in order to compel their production because of the "Required Records Doctrine." App. 11-13.

The Required Records Doctrine, however, is a vestige of the now antiquated content oriented approach to Fifth Amendment protection in document production. Its continued viability and its application to the act of production is, therefore, highly questionable. *Cf*: *United States v. Edgerton*, 734 F.2d 913, 918, n. 4 (2d Cir. 1984); *In re Grand Jury Subpoenas Duces Tecum Dated 6-13-83*

and 6-22-83, 722 F.2d 981, 983-85 (2d Cir. 1983); *In re Kave*, 760 F.2d 343, 356 (1st Cir. 1985). *See also*: *In re Doe*, 711 F.2d 1187, 1197 (1983) (Friendly, J. concurring in part, dissenting in part) (criticisms of the Required Records Doctrine caution against its expansion); *United States v. Lang*, 792 F.2d 1235, 1238-39 (4th Cir. 1986), *cert. denied*, 107 S.Ct. 574 (1986) (by implication) (even if the *content* of a document is not privileged, the act of producing it may be). *But see, e.g.*: *In re Grand Jury Subpoena, (Underhill)*, 781 F.2d 64, 69-70 (6th Cir. 1986) (reading nothing in *United States v. Doe* as weakening the Required Records Doctrine); *accord*: *In re Two Grand Jury Subpoenae*, 793 F.2d 69, 73 (2d Cir. 1986).

The application of the Required Records Doctrine to the Act of Production Doctrine, however, is a mixture of apples with oranges since the former only pertains to the contents of documents which can be excepted from Fifth Amendment protection under certain circumstances. The latter, on the other hand, concerns itself with testimony which has never been excepted from the Amendment's aegis by this Court under any circumstances.

Simply put, the Required Records Doctrine holds that the contents of records required by law to be kept are not protected by the Fifth Amendment. But now, under *United States v. Doe*, the contents of voluntarily kept business documents are no longer protected either. *United States v. Doe*, 465 U.S. 605, 610-12 (1984). Thus, there is no need of a doctrine whose function was, in the first instance, to differentiate between the two in determining the applicability of the Fifth Amendment.

The opinion of the appellate court below failed to confront the clear holding of this Court in *Doe* that although the *contents* of a document may not be privileged, the testimonial act of producing the same document can be

protected. *United States v. Doe*, *supra* at 612. *See also*: *Fisher v. United States*, 425 U.S. 391, 410 (1976) (the act of production has communicative aspects *wholly aside* from the *contents* of the document); *In re Grand Jury Proceedings On 2-4-82*, 759 F.2d 1418, 1420 (9th Cir. 1985) (the nature of a document is irrelevant to the determination of whether the testimonial act of producing it is privileged); *In re Grand Jury Matter* (*Brown*), 768 F.2d 525, 528 (3d Cir. 1985) (based upon *United States v. Doe* analysis, the testimonial act of producing a document is privileged even if the document itself is not); *accord*: *In re Grand Jury Empaneled 3-23-83*, 773 F.2d 45, 46-47 (3d Cir. 1985).

Instead, the appellate court, in holding that the Required Records Doctrine also excludes testimony from the protection of the Fifth Amendment, relied upon several poorly reasoned lower federal court opinions which were decided before this Court in *United States v. Doe* clearly established the disjunction, for Fifth Amendment purposes, between the nature of a document and the act of producing it. App. 12-13. Moreover, the appellate court dismissed the Bernsteins' argument by simply noting that only voluntarily kept documents were at issue in *United States v. Doe*. App. 12-13. While it is true that the petitioner in *Doe* failed to raise the issue in regard to required records and that this Court has yet to make a definitive pronouncement directly on point, this Court's holding that the testimonial act is protected even if the document is not, clearly implicates a determination against the application of the Required Records Doctrine to the *testimonial* act of production. *See also*: *Shapiro v. United States*, 355 U.S. 1, 26-27 (1948) (the Required Records Exception to the Fifth Amendment extends only to the documents themselves, not to oral *testimony* sought by the government in conjunction with the records).

Indeed, the application of the Fifth Amendment to a demand by the State to produce required records is even more compelling than to a demand for the production of voluntary records. Because of their very nature, a failure to keep required records violates a law or regulation. In Illinois, a retailer who fails to keep the required records is guilty of a Class 4 felony. Ill. Rev. Stat. Ch. 120, §452 (1985). In the case *sub judice*, the State does not know whether the Bernsteins have kept required records. If they have not, however, and if they are compelled to produce them without a grant of immunity, they will necessarily be compelled to testify against themselves by admitting the nonexistence of these records in order to avoid the contempt citation.[4]

By reason of the foregoing authorities, it is obvious that the act of producing documents is testimonial in nature, regardless of their contents or whether they are kept voluntarily or under compulsion of law. Moreover, this Court has never swayed from its pronouncement that potentially incriminating *testimony* is always protected by the Fifth Amendment. Accordingly, the decision of the appellate court below holding that the Required Records Doctrine vitiates Fifth Amendment protection for the act of producing required records should be reversed.

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[4] The existence of the Required Records Doctrine has been problematic from the outset. *See*: *In re Doe*, 711 F.2d 1187, 1196 (1983) (Friendly, J. concurring in part, dissenting in part and citing commentary calling the Doctrine illogical and a "bizarre result in a constitutional system"). This Court's reason for holding that the contents of voluntary business records were no longer protected by the Fifth Amendment was that the privilege protects the person only from *compelled* self-incrimination and that no compulsion is present when business documents are prepared voluntarily. *United States v. Doe*, 465 U.S. 605, 610-12 (1984). Then why a doctrine that excepts protection for documents that are prepared under governmental compulsion?

CONCLUSION

The immunity afforded the Bernsteins by the appellate court is illusory and nonexistent since it neither released them from prosecution for any crimes nor prohibited use of evidence to be derived from the testimony which will be compelled under the purported grant of immunity in any such prosecution. This is clearly in violation of the Bernsteins' rights under the Fifth Amendment to the United States Constitution.

Additionally, because the Required Records Doctrine cannot nullify the Act of Production Doctrine, the Bernsteins' testimonial act of producing even required records may not be compelled without a proper grant of immunity.

WHEREFORE, the petitioners pray that their petition for a writ of certiorari to the Illinois Appellate Court, First District—Third Division be granted.

Respectfully submitted,

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APPENDIX

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THIRD DIV. FILED 4-15-87

No. 86-1002

IN RE JANUARY, 1986 GRAND JURY, No. 217, PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JACK AND WANDA BERNSTEIN, Defendants-Appellants.	)))))))	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY HONORABLE JAMES M. BAILEY PRESIDING

PRESIDING JUSTICE McNAMARA delivered the opinion of the court:

This is an appeal from an order of the circuit court of Cook County granting the State's motion for a rule to show cause which holds appellants in contempt and imposes a fine of $50 for each day they fail to produce documents sought by a Grand Jury *subpoena duces tecum.* The trial court stayed the order pending appeal. On appeal, appellants challenge the subpoena and production of the documents based upon their Fifth Amendment privilege against self-incrimination. Appellants claim the immunity granted them pursuant to the Illinois immunity provision is insufficient to protect their Fifth Amendment rights. They also maintain that the Grand Jury subpoena violates the Fourth Amendment prohibition against unreasonable search and seizure and the Fourteenth Amendment Due Process Clause.

The State began a grand jury investigation of appellants Jack and Wanda Bernstein personally and d/b/a Milwaukee Products for the alleged failure to pay the proper amount

of retailer occupation taxes and income taxes for the years 1982 through 1984. The Grand Jury issued a *subpoena duces tecum* to the Bernsteins seeking the following documents: (1) any retained copies of state and federal tax returns including schedules and attachments; (2) all cancelled checks; (3) all bank statements; (4) all inventory records; (5) all sales and purchase invoices; (6) all other records pertaining to any and all sales and purchases of goods by or from the business known as Milwaukee Products for years 1982, 1983 and 1984; and (7) all written materials provided by the Bernsteins to their accountant for the preparation of their tax returns for those three years.

The Bernsteins appeared before the Grand Jury and refused to answer questions or produce the requested documents asserting their Fifth Amendment privilege against self-incrimination. As a result of the Bernsteins' refusal to produce the documents, the court granted the State's request for immunity for both Bernsteins under the Illinois immunity provision. (Ill. Rev. Stat. (1985), ch. 38, par. 106 *et seq.*) The immunity order granted the Bernsteins "production immunity" for admitting that the records and documents which are not required to be kept by statute or regulation (1) exist, (2) are the ones sought in the subpoena and (3) are in the Bernsteins' custody. The immunity order also specified that no immunity was being granted with respect to any crimes which the contents of the documents might reveal were committed, nor was any immunity granted with respect to the production of any records or documents required to be kept by law.

After granting immunity to the Bernsteins, the State continued to assert that it could prosecute the Bernsteins for sales tax fraud and income tax fraud for 1982 through 1984. The Bernsteins continued to assert their Fifth Amendment privilege claiming that their privilege was not adequately protected by the court's grant of immunity. As a result, the State sought a rule to show cause why the Bernsteins should not be held in contempt of court. After a hearing, the trial court issued the rule to show cause and fined the Bernsteins.

The State has divided the documents they seek into two types, those documents required to be kept by law, and those documents or records voluntarily kept by the Bernsteins. The State only sought immunity for the records which were voluntarily kept and argues that all records which are required to be kept by law are exempt from the Fifth Amendment by virtue of the "required records doctrine."

We will first address the Bernsteins' challenge to the immunity granted to them for the production of the voluntarily kept records. The voluntary records referred to by the State are the retained copies of the Bernsteins' federal and state income tax returns, including all schedules and attachments for the years 1982 through 1984, all written material provide by the Bernsteins to their accountant for the preparation of their returns in those years, and all voluntarily kept records pertaining to purchases and sales by Milwaukee Products. We note that our holding in *People v. In re October 1985 Grand Jury No. 746*, (1987), 154 Ill. App.3d 288, compels production by the Bernsteins' accountant of the Bernsteins' tax returns and materials provided to the accountant. This previous ruling obviates the need, for purposes of this case, to compel production of these records from the Bernsteins. We will, however, continue our discussion of the protection to be afforded voluntarily kept records pertaining to purchases and sales. In addition, we find that the Bernsteins' cancelled checks and bank statements properly fall into the category of voluntarily kept records. The State mischaracterized these records in the trial court as required to be kept pursuant to regulation. Because they are not required to be kept by law, the order granting immunity extends to the production of the Bernsteins' cancelled checks and bank statements.

The Fifth Amendment privilege against self-incrimination is applicable to State court proceedings. And Article I, section 10 of the Illinois Constitution creates a privilege identical to the Fifth Amendment. Illinois courts will follow the decisions of the United States Supreme Court

on identical state and federal constitutional provisions. *People v. Jackson* (1961), 22 Ill.2d 382, 176 N.E.2d 803, *cert. denied* (1962), 368 U.S. 985.

In *United States v. Doe* (1984), 465 U.S. 605, the Supreme Court analyzed the scope of the Fifth Amendment protection to be afforded to documents and records which are voluntarily kept or prepared. The Court stated, "[T]he Fifth Amendment would not be violated by the fact alone that the papers on their face might incriminate the taxpayer, for the privilege protects a person only against being incriminated by his own compelled testimonial communications." (*United States v. Doe* (1984), 465 U.S. 605, 611 (quoting *Fisher v. United States* (1976), 425 U.S. 391, 409-10).) The *Doe* court concluded that the contents of the voluntarily kept documents were not privileged absent a showing that the owner prepared the documents involuntarily or that the subpoena would force him to restate, repeat, or affirm the truth of their contents. 465 U.S. 605, 612.

The Bernsteins do not contend that the requested documents were kept under any compulsion. Rather, the documents, if in existence, were voluntarily maintained in the ordinary course of running their business. Therefore, no compulsion is present and the contents of the documents are not privileged consistent with our reading of *Fisher* and *Doe*.

The actual rule developed and enunciated by the *Fisher* and *Doe* cases states that although the contents of a document may not be privileged, the act of producing the document may be. In *Doe*, the district court found and the Supreme Court upheld that enforcement of the subpoena would force the respondent to admit the existence of the records demanded, that the records are in his possession, and that they are authentic. (465 U.S. 605, 613-14 n.11.) These communications, if compelled by subpoena, would constitute testimonial self-incrimination. As in *Doe*, compelling production of the voluntarily kept documents in the present case will have testimonial im-

pact and a possibly incriminating effect. We therefore find that the State, in order to compel production of these records, must grant the Bernsteins immunity for the act of producing the documents and the compelled testimonial statements that accompany production.

The motion presented to the court seeking immunity for the Bernsteins stated that immunity was sought pursuant to the Illinois immunity provision (Ill. Rev. Stat. (1985), ch. 38, par. 106 *et seq.*), which in relevant part states:

> "106-1. Granting of Immunity. In any investigation before a Grand Jury, or trial in any court, the court on motion of the State may order that any material witness be released from all liability to be prosecuted or punished on account of any testimony or other evidence he may be required to produce.
>
> 106-2. Effect of Immunity. Such order of immunity shall forever be a bar to prosecution against the witness for any offense shown in whole or in part by such testimony or other evidence except for perjury committed in the giving of such testimony."

The language of section 106-2 provides for a grant of transactional immunity. (*People ex rel. Cruz v. Fitzgerald* (1977), 66 Ill.2d 546, 363 N.E.2d 835.) Transactional immunity is broader than the immunity granted by the federal statute which grants use and derivative use immunity and prevents the prosecution from using the compelled testimony or any information derived therefrom in the prosecution of the witness. Transactional immunity accords full immunity from prosecution for any offense to which the compelled testimony relates. (*Kastigar v. United States* (1972), 406 U.S. 441.) In interpreting section 106's predecessor section which was similarly worded, our supreme court stated that the statute eliminates the constitutional privilege against self-incrimination by a grant of immunity that bars the prosecution of the witness for any offense "shown in whole or part by such testimony." (*People v. Walker* (1963), 28 Ill.2d 585, 590, 192 N.E.2d 819.) Considering the principles set out in *United States*

v. Doe and the transactional immunity granted by the Illinois immunity provision, the issue presented by the Bernsteins is whether or not the grant of immunity will protect them from prosecution for sales and income tax fraud. Pursuant to *Doe*, the contents of the documents are not protected, yet it is clear that transactional immunity attaches to all claims directly revealed by the act of producing the requested documents.

We agree with the Bernsteins that transactional immunity may not be transmuted into anything short of a prohibition against the prosecution for all offenses to which the compelled evidence relates. (*People ex rel. Scott v. Walsh* (1980), 89 Ill. App.3d 831, 412 N.E.2d 208; *People ex rel. Cruz v. Fitzgerald.*) The compelled testimony for which the State has offered immunity is that the records sought exist, are in the Bernsteins' possession, and are the records sought by the subpoena. The Bernsteins maintain that even this testimony "relates" to the crimes of state income and sales tax fraud which the State seeks to pursue. We believe, however, that compelled testimony that the records exist and are in the Bernsteins' possession does not relate to the crimes of tax fraud. Immunity for the act of production is narrow and protects the Bernsteins only from prosecution for any crimes which are revealed by the existence or possession of the requested records.

Moreover, pursuant to *Doe*, the contents of the records are not protected. Any evidence revealed by the contents of the documents which would aid the State in its prosecution can be used. The immunity order issued by the trial court is in accordance with these findings. We therefore find that the immunity order was proper and we refuse to issue the requested Writ of Prohibition sought by the Bernsteins prohibiting the State from continuing its investigation and prosecution.

The State has also attempted to compel production of the following records which they consider to be "required records" because they are required by statute or regula-

tion to be kept; all cancelled checks; all bank statements; all inventory records; and all sales and purchase invoices pertaining to the business known as Milwaukee Products. As noted above, we find that the cancelled checks and bank statements were mischaracterized by the State and should be voluntarily kept records.

The State did not seek immunity for any records required to be kept due to the required records doctrine which provides that an individual may not assert the Fifth Amendment privilege against self-incrimination to shield personal business records if those records are required by law to be kept. *Shapiro v. United States* (1948), 335 U.S. 1; *People v. Herbert* (1982), 108 Ill. App.3d 143, 438 N.E.2d 1255, *cert. denied* (1983), 459 U.S. 1204.

The Bernsteins first claim that the records labelled by the State as required records actually are not required to be kept. The Bernsteins cite the Retailers' Occupation Tax Act (Ill. Rev. Stat. (1985), ch. 120, par. 440 *et seq.*), and section 130.805 of the Illinois Administrative Code (86 Ill. Admin. Code 130.805 (1985)), adopted by the Department of Revenue as its regulations, as authority that the requested records are not required to be kept. Section 130.805 states what records constitute a minimum requirement:

> "*What Records Constitute Minimum Requirement*
>
> Where a taxpayer's business consists exclusively of the sale of tangible personal property at retail, the following records will be deemed by the Department to constitute a minimum for the purposes of the [Retailers' Occupation Tax] Act:
>
> a) Cash register tapes and other data which will provide a daily record of the gross amount of sales.
>
> b) A record of the amount of merchandise purchased. To fulfill this requirement, copies of all vendors' invoices and taxpayers' copies of purchase orders must be retained serially and in sequence as to date.
>
> c) A true and complete inventory of the value of stock on hand taken at least once each year."

The Bernsteins maintain that pursuant to this regulation, they were not required to maintain cancelled checks or bank statements and that the State's request for "all inventory records [and] all * * * sales and purchase invoices * * *" is overly broad and ambiguous. We agree that the minimum requirements do not require a retailer to maintain cancelled checks or bank statements. With respect to sales and purchase invoices, Section 130.801(a) of the Administrative Code specifically lists "all sales and purchase invoices" as required records. (86 Ill. Admin. Code 130.801(a) (1985).) The State has conceded that only annual inventory records are required and it has offered to amend the subpoena to reflect this requirement. We therefore find that the inventory records and invoices are required to be kept and now we must determine if they meet the requirements of the required records doctrine.

The required records exception to the Fifth Amendment was first recognized in *Shapiro v. United States*, and since has been refined in *Grosso v. United States* (1968), 390 U.S. 62 and *Marchetti v. United States* (1968), 390 U.S. 39. Essentially, the exception states that where an individual is required by the government to keep records, those records are subject to disclosure if the following three factors exist: (1) the purpose of the record keeping requirement is essentially regulatory; (2) the records are of a kind customarily kept; and (3) the records themselves have assumed public aspects. (*See also: People v. Herbert* (1982), 108 Ill. App.3d 143, 438 N.E.2d 1255, *cert. denied* (1983), 459 U.S. 1204.) We will consider each prong of this test to determine if the required records exception applies to the records sought by the State in the subpoena.

Under the first prong, the Bernsteins contend that the purpose of the recordkeeping requirement is not regulatory, but rather is to apprehend violators of the tax act. The State argues that the purpose of the Retailers' Occupation Tax Act and the recordkeeping requirements promulgated thereunder is to collect taxes and not to apprehend violators. We agree with the State. The purpose of the regulation, as suggested by the Title, is to aid the govern-

ment enforcement and collection of taxes. The Bernsteins claim that the State's characterization of the purpose of the requirement was rejected by the Supreme Court in *Marchetti v. United States*. However, the tax levied there is clearly different than the tax imposed in the present case. In *Marchetti*, the statute was the federal wagering tax statute and the recordkeeping requirement involved registering before engaging in the business of accepting wagers. The *Marchetti* court, in finding no regulatory purpose, stated, "[T]he United States' principal interest is evidently the collection of revenue and not the punishment of gamblers, (citation omitted), but the characteristics of the activities about which information is sought, and the composition of the groups to which inquiries are made, readily distinguish this situation from that in *Shapiro*" (maximum price regulation under the Emergency Price Control Act). In *Marchetti*, the Court was not hesitant to note that the group regulated was inherently suspect of criminal activity. (*Marchetti v. United States* (1968), 390 U.S. 39, 57.) The activity regulated in *Marchetti* is widely prohibited by both federal and state laws and is clearly distinguishable from the statute before us.

Furthermore, in *People v. Herbert*, the respondent argued that because his records were sought by a grand jury investigating him for possible criminal violations, the reason for which his records were sought was not regulatory. The court held that respondent was improperly attempting to shift the focus away from the purpose for which the records were required to be kept to the purpose for which they were sought. In *Herbert*, the purpose of the recordkeeping requirement was to monitor the operation of Medicaid programs. The regulation before us is similar in the way it aids in enforcement of a government program. The recordkeeping requirement is part of a regulatory scheme established by the Department of Revenue and adequately fulfills the regulation requirement for the required records doctrine.

The second prong of the required records doctrine requires that the records must be of a type customarily

kept. The Bernsteins claim that the State must prove that they, as opposed to any retailer, would customarily keep the records sought, and, since there was no evidence or admission by them that they kept such records, the State has failed to meet its burden. We do not agree. The State need only prove the retailers would customarily keep such records. Without further inquiry, we find it to be a fair assumption that purchase and sales invoices and inventory records would customarily be kept by a retailer.

Finally, the required records must have assumed some public aspects. In *People v. Herbert* the court held that the required records, medical records of various Medicaid recipients, had assumed public aspects because they assisted the Department of Public Aid in its analysis of the operation of the Medicaid program. The *Herbert* court emphasized that the records could be inspected by officials of the Department of Public Aid. The tax program in the case before us is analogous to the Medicaid program. The recordkeeping requirement is for the purpose of assisting the operation and regulation of state tax collection. The Department of Revenue, simply by virtue of requiring that these records be kept, implicitly reserves the right to inspect the records, and the records thereby obtain public aspects.

The Bernsteins cite the case of *United States v. Porter* (7th Cir. 1983), 711 F.2d 1397, for the proposition that the IRS-taxpayer relationship is insufficient to instill the taxpayer's tax records with public aspects. In *Porter*, the government sought business records of a sole proprietor for the purpose of investigating possible federal income tax evasion. We envision two problems with the Bernsteins' reliance on *United States v. Porter*. Before reaching an analysis of the government's required records argument, the *Porter* court granted protection to the production of the taxpayer's cancelled checks and deposit slips under an application of the act of production theory described in *Fisher*. The *Porter* court determined that, while the contents of the documents were not protected, the act of producing cancelled checks and deposit slips results

in compelled testimony protected under the Fifth Amendment. (*United States v. Porter* (7th Cir. 1983), 711 F.2d 1397, 1402.) To reach this conclusion based on *Fisher*, the court must have made the implied determination that the preparation or maintenance of all the records sought was wholly voluntary. We therefore fail to see how the court could afford the voluntarily kept records protection under *Fisher* and subsequently pursue an analysis of the same records under the required records exception to the Fifth Amendment.

Furthermore, the records sought by the government in *Porter* were for an investigation for failure to comply with federal income tax laws. In contrast, the government in the present case sought the records for enforcement of income tax *and* the Retailers' Occupation Tax Act. The federal government does not regulate operation of retail trade. In *Porter*, if the government was successful in obtaining the information, they could prosecute only for a violation of the individual tax requirements. The difference in requiring records for enforcement of individual tax liability and requiring records for enforcement of a retailer's tax liability is clear.

The initial requirement of this doctrine, that the records be required as part of a government regulatory program, is closely related to this requirement of public aspects. As in *Herbert*, it is the regulation of a government program that instills the records with public aspects. Because the records in this case are required to be kept for retailer occupation tax purposes, and may be inspected by the Department of Revenue, the documents are instilled with public aspects. Since we find that the records sought by the subpoena were required to be kept for a regulatory purpose, customarily would be kept by the regulated party and have assumed public aspects, they properly fall within the required records exception to the Fifth Amendment and must be produced.

We briefly note that the Bernsteins argue against the continued viability of the required records doctrine. We fail to read any of the cited authority or support for this

contention as doing away with or overruling our application of the doctrine.

The Bernsteins next contend that even though the required records doctrine eliminates any privilege for the contents of the required records, the act of producing the same documents may still be privileged under the act of production doctrine as developed in *Fisher* and *Doe*. The Bernsteins rely on a portion of the *Shapiro* opinion which held that even if the contents of the documents are not privileged, any testimonial evidence in relation to those documents can be compelled only in exchange for a proper grant of immunity. (*Shapiro v. United States* (1948), 335 U.S. 1, 26-27.) The *Shapiro* court, however, was referring only to oral testimony which was related to the compelled documents. This discussion in *Shapiro* was not, as the Bernsteins imply, a foreshadowing of the act of production doctrine which was first enunciated by the Court in 1976.

From all available case law, it is difficult to determine the inter-relationship, if any, between the act of production doctrine and the required records doctrine. From an analysis of what case law does exist, however, we find that once a court has determined that a party's records are required to be kept, this party cannot then claim that the act of producing the required documents is protected.

In *In re Doe* (2nd Cir. 1983), 711 F.2d 1187, the court addressed the same argument made by the Bernsteins in this case. The court held that the required records doctrine is an exception to the Fifth Amendment privilege. As such, it necessarily overrides the privilege in instances in which the privilege would otherwise apply. The court noted that *Fisher* was not concerned with required records and that nothing in its analysis could be construed as weakening the required records doctrine. (*In re Doe* (2d Cir. 1983), 711 F.2d 1187, 1192-93.) Although *In re Doe* was decided before *United States v. Doe*, the reasoning in the latter case supports our conclusion even more. The Court in *United States v. Doe* stated that the case

concerned only business records and documents not required by law to be disclosed to a public agency. (*United States v. Doe* (1984), 465 U.S. 605, 607 n.3.) The decision in *United States v. Doe* does not concern required records and, as with *Fisher*, has no effect on the required records doctrine.

Furthermore, in *In re Grand Jury Subpoenas Duces Tecum Dated June 13, 1983 and June 22, 1983* (2nd Cir. 1983), 722 F.2d 981, the court in commenting on the applicability of the act of production doctrine to corporate records, stated that the governmental requirement that records be kept implies an obligation to produce them upon the government's demand, which amounts to a waiver of any Fifth Amendment claim with respect to the act of production. The court also stated that since the records are required to be kept, production of them can hardly provide the basis for an inference of criminality in possessing them. (722 F.2d 981, 987 n.5.) We find these to be fair assertions of the relationship between the act of production doctrine and the required records doctrine. Therefore, because we have held these documents to be required, we do not find it necessary to grant immunity in regard to the production of the documents.

The Bernsteins make several other claims in regard to the subpoena seeking production of their records. They argue that the subpoena violates their Fourth and Fourteenth Amendment rights. Within these arguments, they first contend that any material sought for the time beyond the statute of limitations is irrelevant and incompetent. The statute of limitations, however, mandates that a prosecution for a violation of this statute must be commenced within three years of the commission of the violation. (Ill. Rev. Stat. (1985), ch. 120, par. 452.) The statute has no relevance to the gathering of information for the purposes of a grand jury investigation. While the statute may eventually bar prosecution for the period beyond the statute of limitations, the grand jury is not limited by this time constraint. Any information which legitimately can be obtained by the grand jury may be relevant to the

prosecution for the allowable period even if the information relates to the period beyond the statute.

In regard to the Bernsteins' contention that the subpoena is overbroad, we do not agree. The subpoena sufficiently specifies which documents are sought by limiting itself to the records that reflect certain transactions for a specific time period. The subpoena does not make a demand for irrelevant material. Nor do we find merit in the Bernsteins' claim that the State's demand is pure harassment. It is irrelevant to this appeal that the State requested all documents provided by the Bernsteins to their accountant since the issue has been determined by the previous appeal in this case. *People v. In re October 1985 Grand Jury No. 746*, (1987), 154 Ill. App.3d 288.

For the foregoing reasons, the order of the circuit court of Cook County holding the Bernsteins in contempt for failure to produce the documents is affirmed.

Order affirmed.

RIZZI and WHITE, JJ., concur.

STATE OF ILLINOIS
COUNTY OF COOK—ss

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION

THE PEOPLE OF THE STATE OF ILLINOIS,	)	No. January, 1986 Grand Jury #217
v.	)	Before JAMES BAILEY March 25, 1986
WANDA BERNSTEIN JACK BERNSTEIN	)	1:30 p.m.

REPORT OF PROCEEDINGS

Court convened pursuant to adjournment.

Present:

HONORABLE NEIL F. HARTIGAN,
Attorney General, by
MR. EDWARD CARTER,
Assistant Attorney General,
appeared for the People

ENGERMAN & ERLICH, LTD., by
MR. CARLO E. POLI,
Attorney at Law,
appeared for the Defendants

FILED: JUNE 6, 1986
Morgan M. Finley
Clerk of the Circuit Court

THE CLERK: The People of the State of Illinois versus Jack and Wanda Bernstein.

THE COURT: This is the Attorney General. Grand Jury Number 217. People versus Jack and Wanda Bernstein. This is the State's motion to rule—for rule to show cause.

MR. POLI: Good Morning your Honor. Carlo Poli, Engerman & Erlich, Ltd., on behalf of Jack and Wanda Bernstein.

MR. CARTER: We have a response. It originally was the State's motion—

THE COURT: Do we have the motion counsel?

MR. CARTER: Judge, I'll make my comments fairly brief. We have given you extensive written memorandums on the issue. Essentially the State has subpoenaed two types of documents from Jack and Wanda Bernstein. Those documents were characterized as voluntary documents and as required records. As to the voluntary documents, the State has asked you or was granted a motion for immunity as to the acts of producing those documents but not as to what's contained in the documents.

Defense has raised two issues in connection with the grant of immunity. One they have said that immunity is not statutorily adequate because it does not confer transactional immunity.

Our position is that the statute allows us to choose what we want to immunize, the target or the subject of the Grand Jury subpoena. The statute says any evidence or testimony that the target is required to give. We have chosen in this case to immunize the act of production and we would say that immunization grants the targets, the Bernsteins, immunity as to anything that's inherent in the act of production based on Fisher and Doe. Transactional production that relate to the possession of the documents and genuineness. As to whatever label we put on the actual grant of immunity, the important point is that we do follow the requirements of the statute.

The defense has also said that we did not follow the Doe case because in their immunity order, we didn't specifically provide for immunity as to the act of authentification. Our language is broad enough to include that the time that you granted the immunity we said that we would be willing to amend the order to specifically include that, that's still our position at this time.

As to the other documents that we've sought, these are what we call the required records and we have sought immunity as to the required records.

Our position is that the Required Record Doctrine takes these documents out of the protection of the Fifth Amendment as long as we satisfy all the elements of the five prong test. The first element of which is that the purpose of the record keeping requirement must be regulatory in nature. En re Doe case, that's from the Second Circuit Court of Appeals, not to be confused with the one before the Supreme Court. The Appellate Court held that W 2 forms that a taxpayer keeps was a requirement, that a taxpayer keep W 2 forms was regulatory in nature and certainly if keeping—if the requirement to keep W 2 forms is regulatory in nature, we would argue that the requirement to keep documents that relate to sales for tax purposes is also regulatory in nature.

The defense has argued that the sole purpose of the regulatory requirement is to apprehend criminals and therefore this destroys the regulatory nature of the record keeping requirement. This the State feels is incorrect. First of all, the purpose of the statute is to tax sales. Taxes can be collected civilly and is usually collected civilly. It's only a small number of cases that come to criminal prosecution. The records can be used for audits to verify the accuracy of tax returns and the records can also be used to monitor the operation of the state tax system. The fact that the De Jourdan case cited in a brief makes clear the fact that there may be criminal sanctions in the statute, it does not destroy its regulatory nature as long as there is a regulatory purpose to the record keeping

requirement. The defense has cited the Marketti case in support of its position as to the regulatory element. However we would argue that Marketti is distinguishable because in Marketti the transaction that had to be reported that is, gambling, was itself criminal. Where as in this case the transaction that must be recorded and which the State would see if it got the records are legal and that is purchases of goods for resale is legal and sales of goods at retail are legal.

The second element of the required records test is the records must be of the type that are customarily kept. It's the State's position based on the Underhill case and Bionic Auto Parts that this element is satisfied as long as they're the type of records that a person in that particular business or trade would actually keep.

The defense has argued that the records must be of a type that the person voluntarily keeps. This is certainly contrary to Underhill and Bionic Auto Parts. In fact, if this was the formulation of the test, it would enable any taxpayer to simply defeat the record keeping requirement by failing to keep records and would thereby defeat the whole purpose of requiring records in the first place.

The third element of the test is that the records must have public aspects. In the En Re Doe case the Court held that public aspect elements was satisfied simply by the fact that the schedule to drug prescriptions had to be sent to the New York Department of Public Health and W 2 forms had been attached to the income tax returns and sent to an internal revenue service. In Underhill, the Court found the public aspect element satisfied simply by the fact that the odometer statement had to be opened for inspection by the federal authorities. In fact, Underhill harkens back to the early required records cases involving druggists where the druggists were required to keep and hold open for inspection by either the members of public or state authorities prescriptions for alcoholic beverages.

The defense is somehow seeking to link the public aspects elements with the regulatory purpose element. How-

ever our position is based on the Shapiro case, that as long as the records that are required to be kept are relevant to the purpose for which the information is sought. This element is satisfied. It would seem to be redundant to require a re-analysis of the regulatory nature in this element of the test when they have already—The Courts have already examined it in an earlier element of the test.

The fourth element of the test is that the records must not provide a direct link to any criminal activity. In this respect, the Courts since Marketti and Grosso have held that as long as the transaction that is reported is not illegal, that there is no direct link. In fact, that was one of the holdings of the Underhill Court as well as some of the earlier decisions.

I'll deal briefly with two other issues raised by the defense. One, the defense has argued that the act of production doctrine that's been enunciated in the Doe case and earlier Fisher case applies to required records cases. The Underhill court disposed of this issue clearly holding that the act of production doctrine does not apply to required records cases. The reason being that the Required Records Doctrine is an exception to the Fifth Amendment rather than a part of the Fifth Amendment.

The State would also argue that there is no compelled self-incrimination by the Bernsteins in producing the documents. The reason there is no compelled self-incrimination is based on Flores. The Bernsteins voluntarily went into a legal business subject to certain regulations and record keeping requirements. Flores held that this amounted to a waiver of the Fifth Amendment as to producing the documents and that's the situation we have here.

Defense has cited Grosso and Marketti again for the proposition that any criminal could be deemed to waive the Fifth Amendment by engaging in criminal activity. However the Flores Court dealt specifically with this issue again drawing the distinction that the activity that was recorded was a legal activity as opposed to Grosso and Marketti where we had gambling and where the activity itself was illegal.

Finally as to the Fourth Amendment arguments raised by defense, the State would stand on the arguments in its reply.

THE COURT: Counsel?

MR. POLI: We would adopt all the arguments found in our memorandum and make them part of the arguments today.

The crux of the State's argument as to why the Bernsteins should be compelled to turn over voluntary documents notwithstanding the Fifth Amendment to the Constitution, and Article 1 Section 10 of the Illinois Constitution, is that the Bernsteins have been granted so-called production immunity. The State argues that because of production immunity the Bernstein's testimony, which is implicit in the act of producing these documents, can be compelled and the State can continue in its prosecution of the Bernsteins for any crimes that might be revealed by these documents.

The fallacy of the State's argument, Your Honor, is that there is no such thing as production immunity in Illinois. Rather the Illinois Immunity Statute, Illinois Revised Statutes Chapter 38 Section 106, and the Illinois Supreme Court cases interpreting that statute have made it abundantly clear that the only kind of immunity that this Court is authorized to grant is full, unconditional, transactional immunity.

THE COURT: If I were to grant the State's motion, let's say they are wrong and I grant the immunity they're asking for. How would it affect your clients? If it goes against the State of Illinois, wouldn't your clients have immunity from all prosecution? So how could it hurt you?

MR. POLI: We feel that the State is insisting that it can still continue in the prosecution of the clients and in that regard, they have to have been released by that.

THE COURT: I just threw that out when I was reading it. If it doesn't exist in the State of Illinois, maybe it will inure to the benefit of your clients.

MR. POLI: That's correct, Your Honor. The Illinois and United State's Supreme Courts have construed transactional immunity to mean that the defendant must have been released from the prosecution of all crimes to which the compelled evidence relates and I would like to underscore the word relates. The State contends that it can choose what it can immunize, but what it can choose is the evidence it will seek to compel under grant of immunity. It may not choose the crimes that will be released.

In its reply, the State pays lip service and admits that the Bernsteins have been given transactional immunity and goes on to concluded that because the testimony is about possession and authenticity of documents, but the subject of the investigation is the crimes of income and sales tax fraud, the State argues it can compel the testimony and nonetheless prosecute the fraud. The State seems to feel that the testimony that is compelled must be the equivalent of an admission of the crime in order for the immunity to attach. This is absurd. It's the same thing as arguing that a suspect, an immunized suspect in a murder conspiracy, can still be prosecuted for murder after he has produced the murder weapon, under immunity, because possession of the murder weapon is not the equivalent of the crime of murder. This is absurd, but this is the proposition offered by the State. In order for the Bernsteins to have been immunized for income and sales tax fraud, the testimony need only relate to those crimes.

Now the United State's Supreme Court has determined that the act of producing documents is testimony protected by the Fifth Amendment because it admits, among other things, that the documents exist and that they are authentic. Surely no one in good conscience can argue that testimony to the effect that certain documents exist and that they are authentic, cannot be related to the crimes that the documents themselves might reveal.

THE COURT: Let me ask you this. You distinguish that the State so-called producing required documents that

you are required to keep under the Illinois statute and the voluntary documents which you keep in the operation of business is not required to be produced?

MR. POLI: In terms of the act of producing these documents as a testimonial implication thereof, no, and I'll go into that a little later, there is no distinction. If there is, required records should be protected even more by the Fifth Amendment.

Accordingly, Your Honor, because of the transactional nature of the Illinois Immunity Statute, unless the State agrees that it will cease in the prosecution of the Bernsteins for the crimes of income and sale tax fraud, and unless proper immunity orders are entered to that effect, the Bernsteins may and will continue to assert their Constitutional privileges.

It should be noted at this point that no immunity is granted to the Bernsteins, in the Court's orders, with respect to any crimes which the contents of the documents might reveal were committed by them and that is what is improper about these immunity orders. We do contend that the Bernsteins have been granted transactional immunity notwithstanding any language in the order to the contrary. The authority for this is the case of the People ex rel Scott versus Walsh, cited in our memorandum. In that case, the State, through the Attorney General's Office, moved to grant the defendant something less than full transactional immunity. The Court allowed the motion. On appeal, the Appellate Court held that because both the State's motion and the Court's order cited the Illinois Immunity Statute and because that statute authorizes nothing short of full, unconditional transactional immunity, then the defendants had been granted that, notwithstanding any language to the contrary in the order. Our case is just like Walsh. The State's motion and the Court's orders of February 7, cited the Illinois Immunity Statute. Accordingly, we ask that the orders be amended to reflect the proper grant of transactional immunity.

Next, Your Honor, the State argues that the Bernsteins can be compelled to turn over required records without any grant of immunity whatsoever.

THE COURT: This is required documents?

MR. POLI: This is the Required Records Doctrine which came to the forefront in the case of Shapiro versus United States. The United States Supreme Court determined that records, which are required by law to be kept, and which meet other criteria, are not protected by the Fifth Amendment. So the State in this case seeks all cancelled checks, all bank statements, all inventory records, and all sales and purchase invoices, without any grant of immunity. Our memorandum, Your Honor, quotes the Illinois Department of Revenue Regulation entitled "What Documents Constitute the Minimum Requirement." The term "all cancelled checks" is no where to be found in that regulation. The term "all bank statements" is no where to be found in that regulation nor are the terms "all inventory records and all sales and purchases invoices." Accordingly the State saying that the Required Record Doctrine applies, fails *ab initio.*

MR. CARTER: The State says inventory, it's not, but I think they have to delete that.

MR. POLI: There is no requirement found within the regulation that they need to keep cancelled checks, that they need to keep bank statements. It's simply not in the regulation. There is some very ambiguous language in the Retailers' Occupational Tax Act to keep all documents that will show this, but that is, at best, unconstitutionally vague. The regulation promulgated by the Department interprets that statute and says a little bit more specifically what must be kept and "all bank statements" are not in there, "all cancelled checks" are not in there, "all inventory records" are not in there. Only once a year, but not "all inventory records."

THE COURT: I think that's annual inventory.

MR. POLI: That is in the regulation but all the rest is not. The State was asking initially in the subpoena for all inventory records without qualifications found in the statute or in the regulation.

Next, Your Honor, the United States Supreme Court in Shapiro versus United States made it quite clear that the doctrine, Required Record Doctrine, excludes only the documents themselves from the protection of the Fifth Amendment, but that any testimony related to those documents is still protected by the Fifth Amendment and may be compelled only in exchange for a grant of proper immunity.

The State cites several cases for the proposition that more than the documents are excluded but that testimony, the testimonial act of production is excluded as well. There is only one case that actually held that and that is the Underhill case. Underhill is based upon a complete misinterpretation of United States versus Doe and a failure to analyze Shapiro. Doe was one of the Supreme Court cases that held that the act of producing documents is testimony. Doe considered the testimonial implications of the act of producing voluntary records only, because the defendants failed to raise the issue in regard to required records. Underhill thus erroneously concluded that because Doe was silent in regard to required records then the Required Record Doctrine, according to Underhill, still applies to testimony concerning the documents. In fact, the doctrine never applied to testimony concerning the documents. Shapiro made it clear that the doctrine excludes the documents themselves, not testimony concerning the documents.

The United States Supreme Court has never made a distinction between the testimonial act of producing voluntary documents and the testimonial act of producing required records. Indeed if there is any such distinction, Your Honor, the reasons as to why the Fifth Amendment should protect the act of producing required records are even more compelling than in the case of voluntary records. If Your Honor orders a defendant to turn over required records, any individual who has failed to keep those required records, the only way he can show that he's not in contempt of Court by his failure to turn the records over, is to make the incriminating admission, the self-

incriminating admission that he has not kept the records. Accordingly, the State cannot seek to compel even the act of producing required records without a proper grant of immunity.

Next as the State admits, there are five additional factors which must be met before the doctrine applies. The primary purpose of the record keeping requirement is to monitor a government program such as medicare, not to catch criminals. The Retailers' Occupational Tax Act is a tax, not a government program. The primary purpose of the record keeping requirement is to catch individuals who have failed to comply with the act.

The Supreme Court in Shapiro, and the Illinois Supreme Court in people versus Herbert, acknowledge that the document is of a type customarily kept by the individual from whom they are sought and that is in reality a question of fact.

THE COURT: What business are they in, by the way? I'm not aware.

MR. POLI: The Bernsteins, I believe it's sale of baby garments, baby clothes. I am not sure.

THE COURT: Is that a retail business?

MR. POLI: They're not personally my clients, they are my firm's clients.

As to the public aspect, the State's sole contention as to why these documents have assumed public status is that the Retailers' Occupational Tax Act is a Licensing Statute. The State doesn't advance anymore theory than that. The U.S. Supreme Court in Marchetti and Grosso versus United States made it clear that the fact that it might be a licensing statute alone, is not enough.

As to the last absent factor, the record keeping requirement cannot provide a direct link to criminal activity. Now the various federal courts have gone all over the ballpark on this. The test that was announced in United States versus Dichne, is whether the regulation is designed to provide proof of a crucial element of a crime. Certainly

the record keeping requirement herein is designed to show proof of whether any retail sales have been made and whether the proper amount of taxes have been paid. These are crucial elements in the crime of sales tax fraud.

Finally, the subpoena violates the Fourth Amendment's prohibition against unreasonable searches and seizures. It seeks material which is beyond the statute of limitation period. In its reply the State cites a common law rule now embodied in Chapter 38 Section 3-8, for the proposition that the statute of limitation here is perpetual in the sense that it runs anew each time a fraudulent tax return is filed. Had the State cited the actual statute, it would have seen that it is only where an offense, one offense, is based upon a series of acts, that the statute of limitation begins to run upon the completion of the last act. The State's argument makes sense only if it contends that an individual can be prosecuted but for only one crime, no matter how many fraudulent tax returns he files.

The phrase asking for all other material relating to sales and purchases is overly broad.

Finally the subpoena asks for material provided to the Bernstein's accountant when the State is well aware that the Honorable Judge Fitzgerald has already quashed a subpoena directed to that accountant.

We ask that the State's motion for rule to show cause be denied and that the Court's immunity orders be amended to comply with the immunity statute and with the Supreme Court decisions.

THE COURT: Well, really this reading of all these cases is that they are really in a state of flux. There isn't any clear cut case in the State of Illinois despite the fact of all the cases quoted by both counsel. I think really this Court is persuaded by a number of cases including United States versus Doe as well as the Shapiro case in which I'm going to basically enter a rule to show cause for not complying with the subpoenas. I grant both of you that there is a lot of legal issues to be resolved. I don't know

if we can resolve them here. I will enter a rule to show cause and failure to comply with result in a $50.00 a day fine. I will stay it while you appeal it. That's the only way that his thing can be resolved.

MR. CARTER: At this point, the State would ask to incorporate all the arguments made in its written memorandum and reply into its oral presentation today.

THE COURT: I'm wondering and I wonder out loud from the standpoint of the defense producing them and basically determining whether the immunity was transactional immunity.

MR. POLI: You pose a very interesting question. We'll have to do a lot of soul searching in that regard.

THE COURT: I just say to you these are questions you are going to have to ask yourself and not me. Draw up the order, basically a rule to show cause as opposed to locking them up. I don't think that's the proper way to do it as far as this case is concerned because I'm not sure as far as the law is concerned, but from what I read, that's basically as I see the statute. I'll have to enforce my rule to show cause at this time. I'm not saying that there is no merit on the part of the defendants in this case.

MR. CARTER: Thank you very much.

THE COURT: Draw up the order and I'll sign it. We'll see where we're going to go from there.

(Which were all the proceedings had in the above-entitled cause that day.)

STATE OF ILLINOIS
COUNTY OF COOK—ss

I, JAMES M. BAILEY, a Judge of the Circuit Court of Cook County, Illinois, County Department, Criminal Division, do hereby certify that proceedings in the case entitled *People of the State of Illinois, Plaintiff v. Jack and Wanda Bernstein, Defendants,* Docket No. January 1986 Grand Jury #217 were held before me on March 25, 1986, at 1:30 p.m. Further, I hereby certify that the above transcript is a true and correct transcript of the said proceedings.

HONORABLE JAMES M. BAILEY, Judge
Circuit Court of Cook County,
Illinois, County Department,
Criminal Division

Filed: June 6, 1986
Morgan M. Finley
Clerk of the Circuit Court

ORDER CCG-2

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT–CRIMINAL DIVISION

People	)	
	)	NO.
v.	)	January Grand Jury
	)	#217
Jack and Wanda Bernstein	)	

ORDER

This cause coming on the to be heard before this Court on motion of the People of the State of Illinois for a rule to show cause, the Court having heard arguments of counsel and being fully advised in the premises, the Court finds:

1. That on January 8, 1986, a Grand Jury subpoena duces tecum, January Grand Jury #217 was issued to Jack and Wanda Bernstein demanding they produce 1) retained copies of certain income tax returns for the years 1982, 1983, and 1984, 2) all written material provided by them to Bernard Drebin for preparation of said income tax returns; 3) and certain specified records required to be kept which relate to sales and purchases of the business known as Milwaukee Products.
2. That it was stipulated between the defense and the state on February 7, 1986 that the Bernsteins would plead the fifth amendment and privilege against self incrimination under the Illinois constitution.
3. That the court granted transactional immunity as to the acts of producing the voluntary documents only and no immunity was granted with respect to producing the required documents.
4. That it was stipulated by the parties that the Bernsteins would continue to raise their privileges against self incrimination under the U.S. and Illinois constitutions.

Therefore, it is ordered:

1) That the state's motion for a rule to show cause be granted.
2) That Jack and Wanda Bernstein together be fined the sum of $50.00 per day for each day they fail to produce the documents.
3) That this the [sic] order be stayed pending appeal.

ENTER: JAMES M. BAILEY
Judge
DATED: 3/25, 1986

Atty No.
Name Edward Carter, Ass't Atty General
Attorney for People
100 W. Randolph St. Room 12-275
Chicago, IL 60601
312 917-3153

MORGAN M. FINLEY, CLERK
OF THE CIRCUIT COURT OF COOK COUNTY

ORDER

IN THE APPELLATE COURT, STATE OF ILLINOIS
FIRST DISTRICT–THIRD DIVISION

IN RE JANUARY, 1986 GRAND JURY No. 217, PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	
v.	)	No. 86-1002
JACK AND WANDA BERNSTEIN, Defendants-Appellants.	)	

ORDER

This cause coming on to be heard on defendants-appellants' petition for rehearing and their alternative request for a certificate of importance;

IT IS HEREBY ORDERED that the petitions are denied.

ENTER:

ORDER ENTERED: MAY 29, 1987

Justice: Daniel J. McNamara
Justice: Dom J. Rizzi
Justice: William S. White

GILBERT S. MARCHMAN, CLERK
OF THE APPELLATE COURT, FIRST DISTRICT

[*Letterhead Of*]

65461

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, IL 62706
(217) 782-2035

October 20, 1987

Mr. Carlo E. Poli
Engerman & Erlich, Ltd.
55 West Monroe St. Suite 3500
Chicago, IL 60603

No. 6561—In re: January, 1986 Grand Jury No. 217 (People State of Illinois, respondent, v. Jack Bernstein, et al., petitioners). Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal as a matter of right in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on November 12, 1987.

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, CRIMINAL DIVISION

IN THE MATTER OF COOK)	Grand Jury Number
COUNTY GRAND JURY)	January, 1986 No. 217
INVESTIGATION AGAINST)	
JOHN DOE)	

ORDER

This matter coming on to be heard on motion by the People of the State of Illinois by their attorney, Neil F. Hartigan, the Attorney General of Illinois, by and through his Assistants, Frank Zera and Edward Carter, to grant production immunity to Jack Bernstein provided by Chapter 38, Section 106 of the Illinois Revised Statutes, in the Matter of Cook County Grand Jury Investigation against John Doe, January 1986 Number 217.

1) The Court being fully advised in the premises does find that Jack Bernstein is a material witness in the above captioned investigation.

2) Jack Bernstein has been subpoenaed by the Cook County Grand Jury as a witness in connection with the above captioned investigation.

3) That the witness, Jack Bernstein has refused to produce the records and documents required by the subpoena duces tecum, January 1986 Grand Jury #217, asserting the Fifth Amendment to the United States Constitution and Article I Section 10 of the Constitution of the State of Illinois.

THEREFORE, the Motion herein is allowed. Jack Bernstein is granted production immunity for admitting that the records and documents not required to be kept by statute or regulation demanded in the subpoena duces tecum January 1986 Grand Jury #217 1) exist; 2) are the ones sought in the subpoena; and 3) are in his custody.

Said grant of production immunity shall extend to Jack Bernstein's testimony regarding their production and shall not extend to the use of the contents of said documents and records against Jack Bernstein. No immunity is granted to Jack Bernstein with respect to any crimes which the contents of the documents might reveal were committed by him. No immunity is granted as to production of any records or documents required to be kept by statute or regulation.

ENTER: JUDGE JAMES BAILEY

DATED: FEBRUARY 7, 1986

Morgan M. Finley
Clerk of the Circuit Court
Criminal Division

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, CRIMINAL DIVISION

IN THE MATTER OF COOK)	Grand Jury Number
COUNTY GRAND JURY)	January, 1986 No. 217
INVESTIGATION AGAINST)	
JOHN DOE)	

ORDER

This matter coming on to be heard on motion by the People of the State of Illinois by their attorney, Neil F. Hartigan, the Attorney General of Illinois, by and through his Assistants, Frank Zera and Edward Carter, to grant production immunity to Wanda Bernstein provided by Chapter 38, Section 106 of the Illinois Revised Statutes, in the Matter of Cook County Grand Jury Investigation against John Doe, January 1986 Number 217.

1) The Court being fully advised in the premises does find that Wanda Bernstein is a material witness in the above captioned investigation.

2) Wanda Bernstein has been subpoenaed by the Cook County Grand Jury as a witness in connection with the above captioned investigation.

3) That the witness, Wanda Bernstein has refused to produce the records and documents required by the subpoena duces tecum, January 1986 Grand Jury #217, asserting the Fifth Amendment to the United States Constitution and Article I Section 10 of the Constitution of the State of Illinois.

THEREFORE, the Motion herein is allowed. Wanda Bernstein is granted production immunity for admitting that the records and documents not required to be kept by statute or regulation demanded in the subpoena duces tecum January 1986 Grand Jury #217 1) exist; 2) are the ones sought in the subpoena; and 3) are in her custody.

Said grant of production immunity shall extend to Wanda Bernstein's testimony regarding their production and shall not extend to the use of the contents of said documents and records against Wanda Bernstein. No immunity is granted to Wanda Bernstein with respect to any crimes which the contents of the documents might reveal were committed by her. No immunity is granted as to production of any records or documents required to be kept by statute or regulation.

ENTER: JUDGE JAMES BAILEY

DATED: FEBRUARY 7, 1986

Morgan M. Finley
Clerk of the Circuit Court
Criminal Division

ILLINOIS REVISED STATUTES CHAPTER 120, SECTION 446 (1985).

Records and books Inspection Destruction of returns, records.

Every person engaged in the business of selling tangible personal property at retail in this State shall keep records and books of all sales of tangible personal property, together with invoices, bills of lading, sales records, copies of bills of sale, inventories prepared as of December 31 of each year or otherwise annually as has been the custom in the specific trade and other pertinent papers and documents. Every person who is engaged in the business of selling tangible personal property at retail in this State and who, in connection with such business, also engages in other activities (including, but not limited to engaging in a service occupation) shall keep such additional records and books of all such activities as will accurately reflect the character and scope of such activities and the amount of receipts realized therefrom.

All books and records and other papers and documents which are required by this Act to be kept shall be kept in the American language and shall, at all times during business hours of the day, be subject to inspection by the Department or its duly authorized agents and employees.

To support deductions made on the tax return form, or authorized under this Act, on account of receipts from isolate or occasional sales of tangible personal property, on account of receipts from sales of tangible personal property, for resale, on account of receipts from sales to governmental bodies or other exempted types of purchasers, on account of receipts from sales of tangible personal property in interstate commerce, and on account of receipts from any other kind of transaction that is not taxable under this Act, entries in any books, records or other pertinent papers or documents of the taxpayer in relation thereto shall be in detail sufficient to show the name and address of the taxpayer's customer in each such transaction, the character of every such transaction, the date

of every such transaction and such other information as may be necessary to establish the nontaxable character of such transaction under this Act.

Except in the case of a sale to a purchaser who will always resell and deliver the property to his customers outside Illinois, anyone claiming that he has made a nontaxable sale for resale in some form as tangible personal property shall also keep a record of the purchaser's registration number or resale number with the Department.

It shall be presumed that all sales of tangible personal property are subject to tax under this Act until the contrary is established, and the burden of proving that a transaction is not taxable hereunder shall be upon the person who would be required to remit the tax to the Department if such transaction is taxable. In the course of any audit or investigation or hearing by the Department with reference to a given taxpayer, if the Department finds that the taxpayer lacks documentary evidence needed to support the taxpayer's claim to exemption from tax hereunder, the Department is authorized to notify the taxpayer in writing to produce such evidence, and the taxpayer shall have 60 days subject to the right in the Department to extend this period either on request for good cause shown or on its own motion from the date when such notice is sent to the taxpayer by certified or registered mail (or delivered to the taxpayer if the notice is served personally) in which to obtain and produce such evidence for the Department's inspection, failing which the matter shall be closed, and the transaction shall be conclusively presumed to be taxable hereunder.

Books and records and other papers reflecting gross receipts received during any period with respect to which the Department is authorized to issue notices of tax liability as provided by Sections 4 and 5 of this Act shall be preserved until the expiration of such period unless the Department, in writing, shall authorize their destruction or disposal prior to such expiration.

ILLINOIS REVISED STATUTES CHAPTER 120, SECTION 452 (1985).

Violations-Penalties.

When the amount due is under $300, any person engaged in the business of selling tangible personal property at retail in this State who fails to file a return, or who files a fraudulent return, or any officer or agent of a corporation engaged in the business of selling tangible personal property at retail in this State who signs a fraudulent return filed on behalf of such corporation, or any accountant or other agent who knowingly enters false information on the return of any taxpayer under this Act, is guilty of a Class 4 felony.

Any person who violates any provision of Section 2a of this Act, or who fails to keep books and records as required herein, or who wilfully violates a rule or regulation of the Department for the administration and enforcement of this Act, or any Purchaser who obtains a registration number or resale number from the Department through misrepresentation, or who represents to a seller that such purchaser has a registration number or resale number from the Department when he knows that he does not, or who uses his registration number or resale number to make a seller believe that he is buying tangible personal property for resale when such purchaser in fact knows that this is not the case, or who engages in the business of selling tangible personal property at retail after his Certificate of Registration under this Act has been revoked in accordance with Section 2b of this Act, is guilty of a Class 4 felony. Each day any such person is engaged in business in violation of Section 2a, or after his Certificate of Registration under this Act has been revoked, constitutes a separate offense.

Any distributor, supplier or other reseller of motor fuel registered pursuant to Section 2a or 2c of this Act who fails to collect the prepaid tax on invoiced gallons of motor fuel sold or who fails to deliver a statement of tax paid to the purchaser or to the Department as required by

Sections 2d and 2e of this Act, respectively, shall be guilty of a Class A misdemeanor if the amount due is under $300, and a Class 4 felony if the amount due is $300 or more.

When the amount due is under $300, any person who accepts money that is due to the Department under this Act from a taxpayer for the purpose of acting as the taxpayer's agent to make the payment to the Department, but who fails to remit such payment to the Department when due is guilty of a Class 4 felony.

Any seller who collects or attempts to collect an amount (however designated) which purports to reimburse such seller for retailers' occupation tax liability measured by receipts which such seller knows are not subject to retailers' occupation tax, or any seller who knowingly overcollects or attempts to over-collect an amount purporting to reimburse such seller for retailers' occupation tax liability in a transaction which is subject to the tax that is imposed by this Act, shall be guilty of a Class 4 felony for each such offense. This paragraph does not apply to an amount collected by the seller as reimbursement for the seller's retailers' occupation tax liability on receipts which are subject to tax under this Act as long as such collection is made in compliance with the tax collection brackets prescribed by the Department in its Rules and Regulations.

When the amount due is $300 or more, any person engaged in the business of selling tangible personal property at retail in this State who files, or causes to be filed, a fraudulent return, or any officer or agent of a corporation engaged in the business of selling tangible personal property at retail in this State who files or causes to be filed or signs or causes to be signed a fraudulent return filed on behalf of such corporation, or any accountant or other agent who knowingly enters false information on the return of any taxpayer under this Act is guilty of a Class 3 felony.

When the amount due is $300 or more, any person engaged in the business of selling tangible personal property

at retail in this State who fails to file a return or accepts money that is due to the Department under this Act from a taxpayer for the purpose of acting as the taxpayer's agent to make payment to the Department but fails to remit such payment to the Department when due, is guilty of a Class 3 felony.

Any person whose principal place of business is in this State and who is charged with a violation under this Section shall be tried in the county where his principal place of business is located unless he asserts a right to be tried in another venue.

Any taxpayer or agent of a taxpayer who with the intent to defraud purports to make a payment due to the Department by issuing or delivering a check or other order upon a real or fictitious depository for the payment of money, knowing that it will not be paid by the depository, shall be guilty of a deceptive practice in violation of Section 17-1 of the Criminal Code of 1961, as amended.

A prosecution for any act in violation of this Section may be commenced at any time within 3 years of the commission of that act.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

IN RE JANUARY, 1986 GRAND JURY NO. 217,

JACK AND WANDA BERNSTEIN,

Petitioners,

v.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, First District, Third Division

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Whether this Court has jurisdiction over this Case?

II. Whether the decision of the Illinois Appellate Court, to grant petitioners immunity toward the act of producing voluntarily kept business records comports with the requirements of the fifth amendment to the United States Constitution?

III. Whether the required records exception to the fifth amendment privilege against compelled self-incrimination is still viable?

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RESPONDENT'S BRIEF IN OPPOSITION

PRAYER

Respondent asks this Court to deny the Petition for Writ of Certiorari to review the judgment and opinion of the Illinois Appellate Court, First District, entered April 15, 1987.

OPINIONS BELOW

The petitioners seek review after the Illinois Appellate Court, First District, rendered its opinion in *In re January, 1986 Grand Jury*, No. 217, 155 Ill. App. 3d 445, 508 N.E.2d 277 (1st Dist. 1987). The opinion is included in the Petition for Writ of Certiorari. The Illinois Supreme Court denied leave to appeal, 116 Ill. 2d 555, ____ N.E.2d ____, October 20, 1987.

JURISDICTION

The jurisdictional requirements are adequately set forth in the Petition. However, there is no case or controversy here. The case is moot. In any event, as treated more fully in the argument, petitioners have not shown grounds for this Court to exercise its sound jurisdiction to grant the Petition for a Writ of Certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The federal constitutional and state statutory provisions involved are fully set forth in the Petition.

STATEMENT OF FACTS

A statement of facts is adequately set forth in the Illinois Appellate Court opinion, 155 Ill. App. 3d 445, 508 N.E.2d 277 (1987) which appears in the Petition at App. 1.

REASONS FOR DENYING THE WRIT

No warrantable concerns compel this Court to exercise its discretionary jurisdiction to review the decisions below. This case is moot, and in any event presents no novel or pressing federal constitutional issue worthy of review here. The decisions of the Illinois courts were in keeping with federal constitutional mandates promulgated by this Court.

I.

THE UNITED STATES SUPREME COURT DOES NOT HAVE JURISDICTION WHERE THE CASE IS MOOT.

Pursuant to investigation for the possibility of crimes by petitioners, in violation of the Illinois Retailers' Occupation Tax Act and the Illinois Income Tax Act for the years 1982, 1983, and 1984, the Cook County Grand Jury, in January, 1986, issued a subpoena *duces tecum*, demanding that petitioners provide certain documents pertaining to their business for the years 1982 through 1984.

Criminal prosecutions under the Retailers' Act are subject to a three year statute of limitations. *See Ill. Rev. Stats.* (1985) ch. 120, §452. Any indication of a crime under this act which occurred during the years in question are

crimes for which petitioners cannot be prosecuted pursuant to the instant grand jury. Prosecution for crimes which occurred during the years preceding 1985 can only take place as a result of an additional grand jury investigation that would reveal the possibility of similar crimes which are not outside the statute of limitations. Only then, could crimes outside the statute of limitations attach. However, here there is no current grand jury investigation of the petitioners for crimes under the Retailers' Act. Although the statute of limitations under the Illinois Income Tax Act is five years, and has passed with regard to crimes which have occurred prior to 1983, because there is no current grand jury investigation for crimes under this act, prosecution pursuant to the instant grand jury can likewise not ensue.

Since the statute of limitations has passed, criminal prosecution under the Illinois Retailers' Occupation Tax Act, and similarly for the years prior to 1983 under the Illinois Income Tax Act, is barred. In any event, there is no further grand jury investigation of the petitioners for the possibility of crimes under both acts. Thus, there is no case or controversy. The case is moot, and this Court lacks jurisdiction.

II.

THE DECISION OF THE ILLINOIS COURTS TO GRANT TRANSACTIONAL IMMUNITY TOWARD THE ACT OF PRODUCING VOLUNTARILY KEPT BUSINESS RECORDS DOES NOT BAR THE STATE FROM PROSECUTING PETITIONERS FOR TAX FRAUD AND COMPORTS WITH THE REQUIREMENTS OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

It is firmly established that business records which are required to be kept by law are not protected by the fifth

amendment privilege against compelled self-incrimination. *Shapiro v. United States*, 331 U.S. 1, 68 S.Ct. 1375 (1948). *Ill. Rev. Stat.* (1985) ch. 120, §446 sets forth the records required to be kept pursuant to the Illinois Retailers' Occupation Tax Act. All of the subpoenaed records falling within this statute are thereby not subject to the privilege.

Likewise, the federal constitutional issue presented here with respect to voluntarily kept business records has already been decided by this Court. *United States v. Doe*, 465 U.S. 605, 104 S.Ct. 1237 (1984), teaches that voluntarily kept business records are not protected by the fifth amendment privilege against self-incrimination. However, the act of producing such documents pursuant to a grand jury subpoena constitutes compulsion of the following testimony:

1) that the documents exist;
2) that the documents are those sought by the state;
3) that the documents are authentic; and
4) that the witnesses possess the documents.

Thus, to comply with the fifth amendment, a grant of at least use immunity must be afforded toward any crime inherent in the compelled testimony. With a grant of use immunity toward the act of producing the voluntarily kept documents, prosecution can still occur for crimes revealed by the act of production. However, testimony inherent in the act of producing the records is barred from evidence.

In Illinois, the only immunity recognized is transactional immunity. See *Ill. Rev. Stats.* (1985) ch. 38, §§106-1, 106-2. This form of immunity offers greater protection than the federal use immunity. In this case, contrary to the premise of petitioners' argument, the Illinois Appellate Court has agreed that not only is the testimony which is re-

vealed as a result of the act of producing the records barred from use, but the petitioners are immunized against prosecution for any criminal act inherent in the production of the compelled testimony. Thus, the grant of immunity complies with the federal constitutional mandates indigenous to the fifth amendment, and in fact exceeds the minimal requirements. Any argument as to the interpretation of the Illinois immunity statute is strictly a matter of state law. This Court does not generally exercise its jurisdiction to decide disputes over a state's interpretation of its own law.

III.

THE REQUIRED RECORDS EXCEPTION TO THE FIFTH AMENDMENT PRIVILEGE AGAINST COMPELLED SELF-INCRIMINATION HAS NOT BEEN OVERRULED.

Petitioners maintain that with this Court's decisions in *Fisher v. United States*, 425 U.S. 391, 96 S.Ct. 1569 (1976) and *United States v. Doe*, 465 U.S. 605, 104 S.Ct. 1237 (1984), this Court abandoned a "content oriented" approach used to examine the nature of the subpoenaed documents for fifth amendment purposes, in favor of a consideration of circumstances related to the compulsion in the act of producing the documents. The petitioners insist that because there is compulsion in a statutory requirement to maintain certain business records, and because there is government compulsion when such records are subpoenaed, that the *Act of Production Doctrine* should apply to the required records as well. Thus, a grant of immunity is necessitated toward the production of all subpoenaed documents whether or not they are required to be kept, and the *Required Records Doctrine* is no longer viable.

Petitioners' reasoning, however, is incorrect. The decisions in *Fisher* and *Doe* simply clarified the fifth amend-

ment privilege with respect to voluntarily kept records and do not apply to cases where required records are at issue. These decisions in no way affect the *Required Records Exception* which is still viable. The *Required Records Doctrine* is premised on a long established rationale, that an individual choosing to do business in an area where the law requires the maintenance of certain records, waives any fifth amendment privilege with respect to those records. *See Wilson v. United States*, 221 U.S. 361, 31 S.Ct. 538, 544-545 (1911) and cases cited therein, *Shapiro v. United States*, 335 U.S. 1, 68 S.Ct. 1375, 1385 (1948). No federal circuit has accepted petitioners' idea. However, at least four federal circuits have emphatically rejected it. *See In re Grand Jury Subpoena Duces Tecum, Underhill*, 781 F.2d 64, 69-70 (6th Cir. 1986); *In re Grand Jury Proceedings, McCoy*, 601 F.2d 162 (5th Cir. 1979); *In re Grand Jury Empanelled March 19, 1980*, 680 F.2d 327, 336, n. 15 (3rd Cir. 1982); *In re Doe*, 711 F.2d 1187, 1191-1192 (2d Cir. 1983).

The application of the fifth amendment with regard to required records is clearly defined by this Court's decision in *Shapiro v. United States*, 335 U.S. 1, 68 S.Ct. 1375 (1948) and no immunity is warranted. The application of the fifth amendment with regard to voluntarily kept business records is clearly defined by this Court's decision in *United States v. Doe*, 465 U.S. 605, 104 S.Ct. 1237 (1984). Under *Doe*, a grant of immunity need only be afforded toward the act of producing the voluntarily kept business records which become the subject of a grand jury subpoena, and the *Required Records Doctrine* is not applicable where voluntarily kept records are at issue. Thus, no novel or pressing issue exists, and the case is not worthy of this Court's review.

CONCLUSION

For the foregoing reasons, the respondent requests that the Petition for a Writ of Certiorari be denied.

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On Petition For Writ Of Certiorari To The Illinois Appellate Court, First District — Third Division

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The State requests denial of the petition for a writ of certiorari, contending that this case is moot. *Brief In Opposition*, pp. 4-5.

The State is correct that the three year statute of limitations has expired for any crimes that the Bernsteins may have committed under the Illinois Retailers' Occupation Tax Act, Ill. Rev. Stat. Ch. 120, §440 *et seq.* (1985) ("sales tax"). *Id.* But, in the same breath the State contends that the Bernsteins may be prosecuted for "similar crimes" for which the limitations period, according to the State, has not expired. *Id.*, p. 4. The State asserts that one such crime is any violation of the Illinois Income Tax Act which may have taken place for the tax years 1983 or 1984. *Id.*

While not relinquishing the possibility that it may indict the Bernsteins for these "similar crimes" and not assuring this Court that it will not enforce the subpoena at issue, the State contends that this case is moot ". . . because there is no current grand jury investigation for crimes under [the Income Tax] act. . ." and that, therefore, ". . . prosecution pursuant to the instant grand jury can likewise not ensue." *Id.*

There is a blatant inconsistency on the face of the State's brief, however. In the first paragraph of its argument, the State acknowledges that the instant grand jury is, in fact, investigating ". . . the possibility of crimes by petitioners, in violation of the . . . Illinois Income Tax Act for the years 1982, 1983 and 1984. . ." *Id.*, p. 3. Indeed, all along the State has contended that the investigation

was for possible violations of both state sales and income tax laws. *See, e.g.*: R. 27.[1]

In addition to the foregoing, the State has commenced two civil proceedings against the Bernsteins to collect any taxes that may be due. The first pertains to the tax years 1982 through 1984; the second, for the tax years 1985 and 1986.

The State had successfully argued in the courts below that it could force the Bernsteins to produce documents pertaining to tax years which were even then beyond the sales tax statute of limitations for criminal violations. *See*: Appellate Court's decision in the Petition at App. 13-14. As such, if the petition herein is denied, the State will argue that the mandate of the Appellate Court directs the Bernsteins to respond to the subpoena, notwithstanding any limitations period. The State may then give the documents to the present grand jury for its *current* investigation of criminal income tax violations; give them to another grand jury for an investigation of "similar crimes;" or give them to its civil division for use in the civil proceedings.

The State's brief overlooks the one fact that is of paramount importance: in the final analysis, this case is an appeal of a trial court's order which held the Bernsteins in contempt for their failure to comply with the subpoena. *See*: Petition, App. 29-30. Though stayed pending appeal, this order imposes a $50.00 *per diem* fine upon the Bernsteins until they produce the documents at issue. *Id.* Al-

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[1] R. 27 is the State's initial brief in the trial court wherein the State asserted: "[The Bernsteins] are *presently* under investigation by the Illinois Department of Revenue for criminal violations of the Illinois Retailers' Occupation Tax *and Income Tax laws*." [Emphasis added].

though the State acknowledges that it can no longer criminally prosecute sales tax violations for 1982 through 1984, it never acknowledges that it will not seek enforcement of the trial court's order. The case is not moot unless the judgment of contempt is dismissed. *Hicks on Behalf of Feiock v. Feiock*, ____ U.S. ____, 107 S.Ct. 259, 260 (1986) (O'Connor, J., in chambers).

In general, a case becomes moot only when the issues presented are no longer "live" or the parties lack a legally cognizable interest in the outcome. *Murphy v. Hunt*, 455 U.S. 478, 481 (1982). The trial court's order is still "live" and the Bernsteins have every interest in reversing it to avoid the stigma of the contempt citation, the fine and another attempt by the State to secure the documents before a different grand jury. Given the State's admissions that it is investigating "similar crimes" for which the statue of limitations may not have run, and given the pending civil enforcement proceedings, the State has every interest in keeping the order in tact.

A case is not moot if a trial court's order requiring disclosure of documents remains in effect. *Cf. In re Grand Jury Investigation No. 78-184*, 642 F.2d 1184, 1187-88 (9th Cir. 1981), *aff'd, sub nom. United States v. Sells Engineering, Inc.*, 463 U.S. 418, 422, n. 6 (1983). If evidence improperly obtained from a taxpayer by a grand jury may be transferred to a civil division of the government for use in civil proceedings, the controversy is ripe and the taxpayer's challenge to the disclosure order is proper. *Cf. Id.*

In summary, as long as the trial court's contempt order imposing a *per diem* fine remains in effect, this case and controversy is not moot.

In the alternative, should this Court agree with the State, then the "capable of repetition but evading review"

exception to the mootness doctrine is applicable. *See*: *Murphy v. Hunt, supra,* at 482. Conspicuous in its absence from the State's brief is any assurance that the State will not seek to procure an indictment of the Bernsteins for the "similar crimes" with a new subpoena from another grand jury. Should this happen, the parties will be "back to square one" with regard to the issues that will have evaded this Court's review in the instant appeal. *See*: *Matter of Special April 1977 Grand Jury,* 581 F.2d 589, 591 (7th Cir. 1979), *cert. denied, sub nom. Scott v. United States,* 439 U.S. 1046 (1979) (applying the "capable of repetition but evading review" doctrine in a continuing criminal investigation where future subpoenas subject to the same objections were likely).

CONCLUSION

WHEREFORE, the petitioners pray that their petition for a writ of certiorari to the Illinois Appellate Court, First District—Third Division be granted.

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